85-1520

No. _____

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EDDIE THOMPSON, JR. and
E. J. THOMPSON

Appellants-Defendants,

vs.

FIRST NATIONAL BANK AND TRUST CO.

Appellee-Plaintiff.

**ON APPEAL FROM THE KENTON CIRCUIT COURT
SECOND DIVISION**

JURISDICTIONAL STATEMENT – CIVIL

CERTIFICATION:

I do hereby certify that 3 copies of the Appeal have been served this ——— day of June, 1985 upon: Mr. G. Richard Wilson, 600 First National Bank Building; Mr. Ed F. Schroeder, Kenton District/Circuit Court Clerk, 406 City-County Building, all of Covington, Kentucky 41011.

. . . . . .

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. . . . . .

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QUESTIONS PRESENTED

I. Whether Rule 35 of Administrative Procedure of the Court of Justice violates the Fourteenth Amendment to the U. S. Constitution, insofar as it permits the Kenton District Court to deny Appellant a trial by jury, without the prepaying of a jury fee.

II. Did the District Court err when it did not receive Appellants' re-issued loan payment/coupon book (a book of original entry) which showed Appellants last payment (No. 55) due April 1982 (where Bank admits it [Bank] received all 34 payments in payment/coupon book) as conclusive of the issue, where the Bank could offer no evidences to refute original record used in regular course of business. (Uniform Business Record as Evidence 9 ULA 387) Ky. CR. 33.03.

III. Did the District Court err in not granting Defendants a Direct Verdict, where the Court called case for trial by jury, Plaintiff did not show nor give any reasons for not showing, and Defendants stood ready for trial. (Ky. CR. 43.03 No Motion or Affidavit)

IV. Did the Kenton District Court err when it neglected to take Judicial notice of K.R.S. 13.105, K.R.S. 24A.170, K.R.S. 360.220(3), K.R.S. 422.010, and the Department of Banking and Securities Record Retention Schedule.

V. Did the Kenton District Court err when it permitted Appellee (Bank) to use a computer printout (prepared in anticipation of lawsuit) as evidence, over Appellants objections, without first establishing the competency of the computer printout.

VI. Did the Kenton Circuit Court err when it summarily approved of error mentioned in Questions I, II, III, IV, V.

VII. Did the Kenton Circuit Court effectively deny Appellant an Appeal when it summarily dismissed Appellants Appeal and affirmed, where Appellee's counsel wilfully neglected to file a counter statement as required by Ky. CR. 72.12.

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In The

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No. _____

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E. J. THOMPSON

Appellants-Defendants,

vs.

FIRST NATIONAL BANK AND TRUST CO.

Appellee-Plaintiff.

JURISDICTIONAL STATEMENT – CIVIL

Appellants, Eddie Thompson, Jr. and E. J. Thompson Appeal from the final judgment of the Kenton Circuit Court entered on December 19, 1984, sustaining the validity of certain Kentucky enactments and statutes, as applied in this case, which denied Appellants due process and equal protection of the law as provided by the U. S. Constitution, 14th Amendment.

CITATION TO OPINION BELOW

On May 15, 1985, the Supreme Court of Kentucky denied Discretionary Review. (App. I, P. 15a)

On March 4, 1985, the Court of Appeals denied Discretionary Review. (App. H, P. 14a)

On December 19, 1984, the Kenton Circuit Court dismissed Appellants Appeal and affirmed the verdict and Judgment of the Kenton District Court. (App. G, P. 12a). Motion

for Judgment notwithstanding the verdict, overruled on August 24, 1983. (N.R. 28) App. F, P. 9a. Judgment was entered on August 15, 1983. (N.R. 26) App. E, P. 7a. Verdict was entered on August 9, 1983. (N.R. 25) Second Pre-Trial Order entered on June 15, 1983, (N.R. 21) App. D, App. P. 5a. Order ruling on all pending motions entered on May 17, 1983. (N.R. 18) App. C, P. 3a. Order of Recusal and Transfer entered on May 2, 1983. (N.R. 15) App. B, P. 2a. Order setting first trial entered on May 6, 1983. (N.R. 13) App. A, P. 1a.

JURISDICTION

At the threshold, we are presented with the question of whether a state Judge's indifference and/or non-adherence to the State's Constitution, statutes, and/or Rules of the Court in favor of Plaintiff and against Defendants, deny Defendants due process and equal protection of the law as guaranteed by the 14th Amendment to the United States Constitution.

In dismissing Appellants' Appeal, the Kenton Circuit Court sustained the constitutionality of Kentucky Constitution, Section 7, Section 115, Kentucky Statutes 13.080(1), 13.105, 24A.170, 360,220(3), 422.010(1); Kentucky CR. 33.03, 43.03, 72.12, Kentucky Administrative Procedure for the Court of Justice, Part II, Rule 35; and Kentucky Department of Banking and Securities Record Retention Schedule, (N.R. Def. Ex. 2) as applied in this case.

There is a fundamental right to a trial by Jury when a proper demand is made. Kentucky Constitution, Sec. 7; *Whitfield* v. *Cornelius*, 554 S.W. 2d 870. Kentucky Administrative Procedure, Part II, Rule 35 provides, . . . jury fee . . . shall be paid at time request for jury trial is made and paid by party making request.

Administrative Procedure is method and procedure before

administrative agencies as distinguished from judicial procedure which applies to court. *Black's Law Dictionary (5th Edition)*.

K.R.S. 24A.170 provides jury fee to be assessed as cost. When statute sets forth the procedure to be followed, the rules of Civil Procedure give way to it, if they are in conflict or inconsistent with statute. *Dawson* v. *Hensley*, 423 S.W. 2d 911.

K.R.S. 24A.170 was not equally applied to Defendants. On what basis could the Court assess cost on Defendant before trial?

Kentucky CR. 33.03 provides an option to producing business records, when requested by interrogatory . . . it is sufficient . . . to afford party serving interrogatories reasonable opportunity to examine . . . inspect such record and to make copies.

K.R.S. 13.080(1), 13.105, and 422.010 required District Court to take judicial notice of the Kentucky Banking and Securities Record Retention Schedule (N.R. Def. Ex. 2) which required the Bank to keep copies of the loan payment/coupon book stubs for 6 years.

K.R.S. 360.220(3) and the contract (Plaintiff's Ex. 1) required: In transaction in which the due date of all or part of one or more installments is deferred or extended or in which the unpaid installments are restated or rescheduled . . . the creditor shall give the debtor the following information at or before the time the extension or deferment is made . . . the revised installment date, if any.

Defendants Exhibit 1 given to Defendant pursuant to State Statute K.R.S. 360.220(3) and the contract, Plaintiff's Ex. 1, shows the last payment (#55) due April 1982.

Failure of District Court to accept loan payment/coupon book pursuant to Business Entry Rule, (in absence of contra-

dictions) denied Defendant due process and equal protection of the law as required by the United States Constitution, 14th Amendment. *Pennoyer* v. *Neff*, 95 U.S. 733, 773; *Fuentes* v. *Shevin*, 407 U.S. 67.

The Kenton Circuit Court also denied Appellant an Appeal (Ky Constitution, Section 115) when it dismissed Appellant's Appeal (as without merit) and affirmed the verdict and judgment of the Kenton District Court, where Appellee had no evidence to support verdict and filed no counterstatement in Kenton Circuit Court as required by CR. 72.12.

The Kenton Circuit Court dismissed Appellants Appeal on December 19, 1984, App. G, P. 12a. Kentucky Court of Appeals denied Discretionary Review on March 4, 1985, App. H, P. 14a. Kentucky Supreme Court denied Discretionary Review on May 15, 1985. App. I, P. 15a. A timely Notice of Appeal to this Court was filed on June 6, 1985. App. J, P. 16a. The Jurisdiction of this Court is conferred by 28 USC 1257(2). The following decisions sustain the Jurisdiction of the Court to review the Judgment of the Kenton Circuit Court. *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282; *Marcus* v. *Search Warrant*, 367 U.S. 717; *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434; IN RE Griffiths, 413 U.S. 717.

CONSTITUTIONAL PROVISIONS INVOLVED

Kentucky Constitution — Section 7. The ancient mode of trial by jury shall be held sacred and the right thereof remain inviolate, subject to such modifications as may be authorized by this Constitution.

Kentucky Constitution — Section 115. In all cases, civil and criminal, there shall be allowed as a matter of right at least one appeal to another court.

U. S. Constitution, 14th Amendment, Section I. No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor

shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1257(2). Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) By Appeal, where is drawn in question the validity of a statute of any state on grounds of its being repugnant to the Constitution, treaties, or laws of the United States. and the decision is in favor of its validity.

K.R.S. 13.105. The court shall take judicial notice of any regulation duly filed under the Provisions of K.R.S. Chapter 13.

K.R.S. 13.080(1). "Administrative Body" means each state board, bureau, commission, department, division, authority, officer, or other entity, except the legislature and courts, authorized by law to make regulations.

K.R.S. 24A.170(4). The jury fee shall be assessed as cost and shall be paid to the clerk by the party against whom costs have been assessed.

K.R.S. 360.220(3). In a closed-end credit transaction in which the due date of *all or part of one or more installments* is *deferred* or extended or in which *the unpaid installments are restated* or *rescheduled* or *reduce* or *rearrange the installment payment*, the *creditor shall give the debtor the following information at or before the time the extension or deferment is made*: (a) The amount of deferment or extension charge, if any; (b) A description of the additional charges, if any, incident thereto and an itemization of each charge; and (c) the revised installment dates, if any, and the revised amount, if any of each installment.

K.R.S. 422.010(1) All courts of this state shall take judicial notice of all acts and resolutions of the general assembly.

KENTUCKY CIVIL RULES

Kentucky CR. 33.03. Option to produce business records – Where the answer to an interrogatory may be derived or ascertained from the business records of a party upon whom the interrogatory has been served, or from an examination, audit, or inspection of such business record, or from a compilation, abstract, or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, *it is sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatories reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts, or summaries.*

Ky. CR. 43.03. Postponement of trial: Motion to postpone a trial on account of absence of evidence may be made only upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it . . .

Ky. CR. 72.12. Within 30 days after the date on which the Appellant's statement of appeal, from the District Court was filed, the Appellee shall file and serve a counterstatement containing the following: (a) The same information required by Rule 76.08 for cross-appeals from the circuit court, (b) A statement of whether Appellee wants oral argument, (c) A statement of whether he accepts the Appellants summary of evidence, if not, a fair and accurate counterstatement of the evidence in question, and (d) A response, not exceeding 10 pages, to the Appellants' statement of legal points and propositions.

KENTUCKY ADMINISTRATIVE PROCEDURE

Kentucky Administrative Procedures of The Court of Justice, Part II, Rule 35.

(1) As provided in K.R.S. 23A.200 and 24A.170, the jury fee for civil cases in circuit court is $25 for a jury of more than six persons, and $12.50 for a jury of six persons. The jury fee for civil cases in District Court is $12.50.

(2) The jury fee in civil cases shall be paid at the time the request for a jury trial is made, and shall be paid by the party making the request . . .

STATMENT OF FACT

On December 23, 1977, Appellee and Appellant entered into a loan contract calling for 55 equal installment payments. (Appellee's Ex. A, NR 1).

One condition of the contract was: "If the final or any installment is more than twice the amount of an otherwise regular installment, that installment must be identified as a 'balloon payment' and the condition of payment or refinancing must be disclosed. K.R.S. 360.220(3)."

During the process of making each monthly payment, in one month, Appellants made 2 monthly payments instead of one payment. In another month, Appellants made 3 monthly payments instead of one payment.

Appellee acknowledged these payments when it (Bank) re-issued Appellants a new loan payment coupon book. (Defendant Ex. 1). The new coupon book showed a balance of 34 equal installment payments due, with the last payment due by April 30, 1982. The Bank admits all 34 payments in the re-issued coupon book were made.

At no time during the course of the loan does Respondent allege that Appellants loan coupon book is in error, nor is any effort made to present any evidence to show any error. After

Appellant made the last payment (No. 55) Appellee claimed Appellants still owed 3 payments. Appellee has produced no proof.

On March 17, 1983, Appellee filed Motion for a Trial Date. (NR 12) At the pre-trial conference on April 14, 1983 (NR 13), Appellants sought copies of loan payment coupons made by Appellants, and new answers to interrogatives. Appellee refused to make information available to Appellants. Hon. Judge West refused to order Appellee to answer interrogatories or make the source of the computer printout information available. Ky. CR. 33.03.

Over Appellants objections, Hon. Judge West set the trial for May 6, 1983 (NR 14, App. A, P. 1a), but told Appellants they could not have a jury trial unless the jury fee was prepaid.

After Appellants prepaid the jury fee, ". . . and in the interest of Justice and to avoid the appearance of impropriety . . ." Judge West filed an Order of Recusal and Transfer, setting trial for May 6, 1983 at 9:00 A.M. (NR 15, App. B, P. 2a). Counsel for Appellee did not show for the trial nor give any reason why he did not show. Hon. Judge Schmadecke summoned the jury, took roll call, then dismissed the jury.

Even though Appellee failed to show for the first trial; failed to offer any direct evidence that would disavow loan payment coupon book given Appellants by Appellee; refused to give new answers to interrogatories, or supply any evidence that would verify the computer printout, the trial court denied Appellants' Motion for dismissal. (App. C, NR 18, P. 3a)

In denying Appellants Motion, Hon. Judge said, "The within matter was transferred to the Third Division by order entered by Judge West on May 2, 1983, and the undersigned Judge having anticipated calling for the empaneling of the jury for trial on the morning of May 6, 1983, later, however to discover on or about May 4, that by interlineating a

revised trial time was established at 1:30 p.m. The court later discovered that Judge West had interlineated the time of 1:30 p.m. to accommodate an irreconcilable conflict in the schedule of Plaintiff's counsel, which conflict was not known by this Judge until the morning of May 6. (App. C, NR 18, P. 3a)

(If Judge West disqualified herself on May 2, and Judge Schmadecke did not know anything until May 6, by what court rule could the time have been changed?)

Black's Law Dictionary, Fifth Edition, defines interlineation as *the act of writing between the lines of an instrument. See also interpolate: To insert additional or false words in a complete instrument or document.*

Webster's New Collegiate Dictionary (1977) defines interpolate as *to alter or corrupt (as a text) by inserting new or foreign matter.*

Hon. Judge Schmadecke on his own motion ordered another pre-trial conference for July 6, 1983. (NR 21, App. D, P. 5a) Again, counsel for Appellee did not show, nor give any reasons for not showing.

At the pre-trial conference, Appellants informed the Court that Appellee had no evidence to support its claim; and that the claim was brought in bad faith with the intent of harassing Appellants.

Subsequently, Appellants filed an Affidavit to this effect which was not refuted. (NR 23)

To present their case, over Appellants objections, the Court permitted counsel for Appellee to present on a large screen, a blown-up view of a computer printout (Plaintiff Ex. A). No foundation was laid for the presentation.

No witness could testify from personal knowledge that Appellants had missed any payments.

The Kentucky Department of Banking and Securities' Record Retention Schedule requires that *Bank retain copies of Movants loan payment coupons for six years.* The Bank makes microfilm of these records. However, the Bank refused to make use of the microfilm because it would show that all payments in Appellants loan payment book were made, and that the last payment in the book (payment # 55) was actually paid on April 29, 1982, instead of the April 30, 1982, date on the computer printout. This information was requested by interrogatories, but refused.

One of the Bank's witnesses (Ms. Schell) testified that from personal knowledge, she knew Appellants had been 3 payments ahead. She also acknowledged that Appellee had given Appellant the new Payment/coupon book.

THE QUESTIONS ARE SUBSTANTIAL

The ultimate question in this case could simply be, what evidence could a party use to refute his (its) records used in the regular course of business. This court has never decided that novice question.

When the competency of business records are called in question, by interrogatories, it is sufficient answer, to specify the records from which answer may be derived . . . and to accord to party . . . reasonable opportunity to examine . . . inspect . . . such records and to make copies. . . CR. 33.03.

When Appellee failed to offer evidence to refute payment/coupon book it gave Appellant, or to answer interrogatories or afford Appellant an opportunity to inspect records, it was obvious Appellee had no evidence.

A finding based upon no evidence is clearly erroneous. *Plageman* v. *Board of Commissioners,* Ky. App. 1978, 569 S.W. 2d 191.

On October 18, 1982 (NR 5), pursuant to CR. 33.03, Ap-

pellants had served Interrogatories upon Appellee (Bank) which requested that in answer to each interrogatory:

(a) Identify by date, preparer (author), location, and custodian each document relied upon or which form a basis for the answer given or which corroborate the answer given or the substance of what is given in answer to these interrogatories.

(b) State whether the information furnished is with the personal knowledge of the person answering and, if not, the name of each person to whom the information is of personal knowledge; and

(c) Identify each person who assisted or participated in preparing and/or supplying any of the information in answer to or relied upon in preparing answers to these interrogatories.

(d) If you maintain that any document or record which refers to or relates to anything about these interrogatories asked has been destroyed, set forth the content of said document, the location of any copies of said document, the date of such destruction, and the name of the person who ordered or authorized such destruction. (Questions omitted)

Appellee did not fully answer interrogatories – so Appellant made a second request for new answers to Interrogatories on December 1, 1982 (NR 9). No answer was ever filed to this request. Rule relating to admissions applies only to admissible facts and upon failure of opponent to admit their truth, they stand admitted and require no proof. *Lyons* v. *Sponcil* (Ky. 1961) 343 S.W. 2d 836.

On July 12, 1983, Appellant informed the Court, by Affidavit, inter alia, that (4) Plaintiff has no evidence to support its claim; (5) Plaintiff's claim is fraudulently intended and only done to harass Defendants (NR 23). No response was filed to the Affidavit.

Failure to respond properly under statute relating to re-

quests for admission may constitute justifying the granting of Summary Judgment or Direct Verdict. *Crest Coal Co., Inc.* v. *Bailey,* Ky. (1980) 602 S.W. 2d 425.

Where there was not sufficient evidence to sustain verdict, Motion for Judgment N.O.V. shold have been granted and it was obligation of Supreme Court to act, even in light of verdict. *Crest Coal Co., Inc.* Supra P. 427.

At the Trial, Ms. Schell testified that from personal knowledge, she knew for certain that Appellant was 3 months ahead, but she could not testify from personal knowledge that Appellant had missed any payments.

A party's testimony adverse to himself, is conclusive as a judicial admission and not subject to contradiction. SEE Kentucky Evidence: Hearsay Evidence Section 36.6, page 506, McCormick, Evidence, Ch. 27.

It was unquestionable that Appellants' loan coupon book is a book of original entry issued through Appellee (Bank) and Bank admits all 34 coupons in the Book had been paid.

Books of a party to an action which are proved to be his only books are usually books of original entry. *People* v. *Dime Sav. Bank* (1932) 183 N.E. 604.

It is well settled, "that a cashbook, bill book, or ledger made up from memoranda, tickets, stubs or slips in the usual way by clerks when the transaction occurred is admissible as original and substantive evidence of transaction shown." *Given* v. *Pearson* (1916), 167 Ky. 574, 181 S.W. 324.

The record (Defendant's Ex. A) clearly showed that the creditor (Bank) gave Appellants a revised date of April 20, 1982, and that it was payment No. 55. This fact was admitted.

K.R.S. 13.105 provides: The Court shall take judicial notice of any regulation duly filed under the provisions of K.R.S. Chapter 13.

K.R.S. 13.080(1) "Administrative body" means each State board, bureau, *commission, department*, division, authority, officer or other entity, except the legislature and Courts, authorized by law to make regulations.

K.R.S. 422.010 provides that (1) all courts of this state shall take judicial notice of all acts and resolutions of the general assembly, (2) all courts, tribunals and officers shall take notice of the official signature of any public officer in this state, the United States or any State of the United States.

Courts may take judicial notice of facts reasonably disputed which either are of common knowledge within territorial limits of courts jurisdiction, or are susceptible to immediate and accurate determination by resort to readily accessible and indisputable source. *Pattie A. Clay Infirmary Ass'n* v. *First Presbyterian Church of Richmond*, 551 S.W. 2d 572.

Ms. Schell also stated she has never seen Appellants coupon book, even though she ordered it, and she did not make any entries pertaining to Appellants' account. She was merely relying upon the *computer* printout. "Testimony as to contents of computer printout was inadmissible under best evidence rule." *State* v. *Springer* 197 S.E. 2d 530.

Witness must testify to information within his knowledge and should not be allowed to advance an opinion in regard to facts he may state. *Mountain Petroleum Co.* v. *Howard*, 351 S.W. 2d 178.

Evidence, which merely furnished basis of conjecture, surmise or speculation is not sufficient on which to rest verdict of jury. *Blue Diamond Co.* v. *Baker*, 375 S.W. 2d 699.

Rights of litigants must not be determined by mere guess work, surmise or speculation. *Peterman* v. *Darby*, 419 S.W. 2d 747.

Even though Appellee filed no answer to Appellants' Mo-

tion for Judgment N.O.V., the Court in denying Motion (App. F, P. 9a) said, ". . . When book was printed by a third party at the request of the Bank, 3 payments were omitted from the printed coupon book." There are no affidavits to this effect, nor has anyone with personal knowledge testified to this effect. Where did the court get that information, it is not in the record. Appellants' new book was in compliance with K.R.S. 360.220(3) and the contract. The Court further stated that Retention Schedule ". . . was not offered into evidence at the trial . . . and thereafter will not be considered at this time."

Notwithstanding the fact that when Appellant began to lay the foundation for presentation of Record Retention Schedule, the Hon. Judge refused to allow Appellant to make presentation, refused to allow Retention Schedule to be introduced and stated, ". . . Defendant was attempting to come through the back door . . ." This further prejudiced Defendant's case and the jury. The Court's action was in violation of the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution.

The best evidence rule requires that the original or primary evidence of an obligation be produced, and no evidence which is secondary or substitutionary shall be received if the original evidence can be had . . . . The terms of the document must be proved by production of the document itself in preference to evidence about the document . . . . It is a frightening prospect to think a person could be sued for service rendered and have the plaintiff base its claim solely upon a recapitulation of computer printout sheets. *Harned* v. *Credit Bureau of Gillette*, 513 P. 2d 650.

As a general rule, in order to comply with the general rule in connection with use in evidence of a summary of voluminous records that the competency of the records must be established and the records be made available to the opposing party for cross-examination. *Union Electric* v. *Mansion House*,

(*MO* 494 S.W. 2d 309, 80 ALR 3d, *Holt* v. *Community Development and Contracting Corp., 1978 Tex Civ App.,* 575 S.W. 2d 395, *Municipal Paving Co.* v. *Farmer,* 255 S.W. 2d 618.

Over one year passed and Appellees did not file a counterstatement in the Kenton Circuit Court as required by CR. 72.12 which states Appellee shall file a counterstatement.

Where Appellee failed to file a brief . . . Court of Appeals would accept Appellants statement of facts and issues as correct. *Smather* v. *May, Ky.* (1964), 379 S.W. 2d 230.

The rules covering briefs are designed to aid the court in reaching a prompt and proper decision of the appeal . . . . Hence as Appellants statement was not contested, it will be accepted as correct. *Copley* v. *Craft* (Ky. 1960) 341 S.W. 2d 71, *Raney* v. *Hall,* Ky. 506 S.W. 2d 510.

In *Detroit Demolition Corp.* v. *Burrough Corp.* 392 MICH 769, 219 N.W. 2d 613, the court said "The court of Appeals denied Appellant an essential element of the right of Appeal when it decided Appeal without giving parties an opportunity to present oral argument directed to the finding of the trial court.

Reviewing Court would reverse judgment when Appellants brief reasonably appeared to sustain such action and Appellee filed no brief. *Hawkins* v. *Wallace,* 384 S.W. 2d 507.

The denial of an Appeal is an unconstitutional restriction of the right of the Appellant. Kentucky Constitution, Sec. 115, *Cole* v. *Stephens,* 582 S.W. 2d 657, and where there was no review of the record, no search by the court below and no determination of whether defendant received a fair trial . . . the defendant has not had the benefit of an appeal. *Taylor* v. *Commonwealth, Ky.* 568 S.W. 2d 52.

The burden of showing an appeal is frivolous is on the party making such suggestion. *Coppedge* v. *U. S.,* 369 U.S. 438.

A State Statute is sustained within the meaning of Section 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds. *Dahnke-Walker Co.* v. *Bondurant,* 257 U.S. 282; *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 441.

CONCLUSION

The questions presented by this Appeal are substantial and require plenary consideration by the Court for their resolution.

Respectfully submitted,

.....

Eddie Thompson, Jr., Pro Se

.....

E. J. Thompson, Pro Se

APPENDIX A

FIRST NATIONAL BANK

Plaintiff,

vs.

EDDIE THOMPSON, JR. AND E. J. THOMPSON

Defendant.

ORDER SETTING FOR TRIAL

(Filed April 15, 1983)

The above styled action is ordered set for trial in the District Court of Kenton County on Friday, May 6, 1983 at 1:30 p.m. in Courtroom 3B, with a jury.

Given under my hand this 15th day of April, 1983.

/s/ JUDY M. WEST
Judge, Second Division
Kenton District Court

APPENDIX B

COMMONWEALTH OF KENTUCKY
SIXTEENTH JUDICIAL DISTRICT
KENTON DISTRICT COURT

NO. 82-C-1402

FIRST NATIONAL BANK AND TRUST COMPANY

Plaintiff,

vs.

EDDIE THOMPSON, JR. and E. J. THOMPSON,

Defendants.

ORDER OF RECUSAL AND TRANSFER

(Filed May 2, 1983)

The defendants, Eddie Thompson, Jr. and E. J. Thompson, having moved the Court for the return of the jury fee or in the alternative that Judge Judy M. West be deemed disqualified from hearing the case, and in the interest of justice and to avoid the appearance of impropriety;

IT IS HEREBY ORDERED that the Court specifically reserves ruling on the motion concerning return of jury fees and the entire case, all issues and motions are hereby transferred to the Third Division of the Kenton District Court, Hon. William L. Schmaedecke presiding, to be tried by jury on May 6, 1983, at 9:00 a.m., in Courtroom 3-B.

SO ORDERED this 2nd day of May, 1983.

/s/ JUDY M. WEST, Judge
Second Division

APPENDIX C

COMMONWEALTH OF KENTUCKY
SIXTEENTH JUDICIAL DISTRICT
KENTON DISTRICT COURT
Third Division

Case Number 82-C-1402

FIRST NATIONAL BANK AND TRUST COMPANY,

Plaintiff,

vs.

EDDIE THOMPSON, JR. and E. J. THOMPSON,

Defendants.

ORDER RULING ON ALL PENDING MOTIONS

(Filed May 17, 1983)

The Defendants having moved the Court for Reclusal of Judge J. M. West, for refund of the jury deposit and further for judgment pursuant to C.R. 41.02 and C.R. 55.01 for failure to prosecute and no order having been heretofore entered excepting the transferral of this action from the Second Division (Judge West) to the Third Division, and the Court being otherwise advised in the premises, now therefore,

IT IS ORDERED in accordance with Rule 35 of the Rules of Administrative Procedures of the Court of Justice, the motion for refund of the required jury deposit of $12.50, be and the same is hereby OVERRULED.

Further, and to clarify the record in this matter, the within matter was transferred to the Third Division by Order entered by Judge West on May 2, 1983, and the undersigned Judge

having anticipated calling for the empaneling of the jury for trial on the morning of May 6, 1983, later, however, to discover on or about May 4, that by interlineating a revised trial time was established at 1:30 p.m., the Court on its own motion reestablished a 9:00 a.m. call. The Court later discovered that Judge West had interlineated the time of 1:30 p.m. to accommodate an irreconcilable conflict in the schedule of Plaintiff's counsel which conflict was not known by this Judge until the morning of May 6. The Court having called the jury together at 9:00 a.m. and being satisfied that to reconvene the panel members at 1:30 p.m. would inflect substantial inconvenience upon the panel members, the Court on its own motion dismissed the panel and remanded the cause to the pending jury docket. Accordingly, the Court rules that the failure to proceed to trial on the morning of May 6, was not a wilful failure on the part of the Plaintiff's counsel but was a mistake in communicating the order of transferrence, now therefore,

IT IS FURTHER ORDERED that the Motion of the Defendants for an Order of Dismissal under Civil Rule 41.02, be and the same is hereby OVERRULED, the provisions of Civil Rule 55.01 not being applicable.

So ORDERED this the 12th day of May, 1983.

/s/ WILLIAM L. SCHMAEDECKE,
Judge of the Kenton District Court

APPENDIX D

KENTON DISTRICT COURT

Jury Trial Division

Case Number 82-C-1402

FIRST NATIONAL BANK AND TRUST COMPANY,
Plaintiff,

vs.

EDDIE THOMPSON, JR. and E. J. THOMPSON,
Defendants.

PRETRIAL ORDER

(Filed June 15, 1983)

This cause having been assigned to the jury docket for trial to be set by the Court and the Court being advised that this matter stands ready for trial;

IT IS ORDERED as follows:

(1) A PreTrial Conference will be conducted in the within proceeding on Wednesday, July 6, 1983, at 3:15 p.m., in Judge Schmaedecke's chambers, Room 407 City/County Building, Covington, Kentucky.

(2) Any objections showing why this matter should not be tried as soon as August, 1983, should be filed together with affidavit of counsel.

(3) At the Pre-Trial Conference, a firm trial date will be

affixed. Plea negotiation should be concluded at or before the time set for PreTrial Conference.

(4) In civil or paternity cases, all such matters presently on the jury docket and for which the required deposit for $12.50 has not been paid by the time of PreTrial shall be removed from the jury docket and shall be reassigned for trial to the Court sitting without a jury.

/s/ WILLIAM L. SCHMAEDECKE,
Judge of the Kenton District Court

APPENDIX E

KENTON DISTRICT COURT
SECOND DIVISION

CASE NO. 82-C-1402

FIRST NATIONAL BANK AND TRUST COMPANY,

Plaintiff,

vs.

EDDIE THOMPSON, JR. and E. J. THOMPSON,

Defendants.

TRIAL ORDER AND JUDGMENT

On August 9, 1983, the above-styled case was called for trial. Plaintiff and Defendant announced ready for trial with Plaintiff represented by Attorney G. Richard Wilson and Defendants representing themselves, *pro se*. Fifteen jurors were called and the parties underwent voir dire examination. Subsequently, the parties made their preemptory strikes and the jury was reduced to a panel of six (6) jurors which were duly sworn and impaneled.

Plaintiff presented its case and rested. Defendants' Motion for a directed verdict after arguments from counsel was overruled.

Defendants presented their case and rested. Defendants renewed their Motion for a directed verdict which was again overruled.

At 12:00 o'clock p.m., Court was adjourned for one hour for lunch. Upon reconvening, the jury was instructed by the Judge. A closing statement was then made by Defendant Eddie Thompson, Jr. and waived by E. J. Thompson.

Attorney G. Richard Wilson then made closing argument for the Plaintiff.

The jury was then sequestered and asked to render a verdict pursuant to the Jury Instructions. The jury returned its verdict answering Question No. 1, "From the instructions above, do you the jury find for the Plaintiff under Instruction No. 3, or for the Defendants under Instruction No. 4? Answer: Plaintiff. The verdict was a unanimous verdict and signed by the foreperson.

The Defendants asked that the jury be polled. Judge William Schmaedecke thereby polled each juror individually asking if the verdict was, in fact, their verdict and all six (6) jurors replied in the affirmative. Thereupon the jury was dismissed by the Judge.

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the Plaintiff, First National Bank & Trust Company of Covington, have Judgment against the Defendants, Eddie Thompson, Jr. and E. J. Thompson, jointly and severally, in the sum of Six Hundred, Thirty-Seven and 58/100 (637.58) Dollars, plus interest at the rate of 14.73% from the date of Judgment until paid in full plus costs.

/s/ WILLIAM L. SCHMAEDECKE,
Judge

APPENDIX F

COMMONWEALTH OF KENTUCKY
SIXTEENTH JUDICIAL DISTRICT
KENTON DISTRICT COURT

Case Number 82-C-1402

FIRST NATIONAL BANK AND TRUST COMPANY,

Plaintiff,

vs.

EDDIE THOMPSON, JR. and E. J. THOMPSON,

Defendants.

ORDER

(Filed August 24, 1983)

This matter came before the Court on Motion of the Defendants, pro se, for Judgment Not Withstanding the Verdict of the Jury under CR 59.01 and CR 62.01.

The Movants cite eight (8) enumerated reasons which the Court for the purposes of this Motion, catagorizes as falling within the following authorized grounds under CR 59.01;

(f) "That the verdict is not sustained by sufficient evidence or is contrary to law," or

(h) "Errors of law occurring at the trial and objected to by the party under the provisions of these rules."

The Court in addressing these two authorized causes classifies the grounds cited in the Defendants' Motion for Judgment N.O.V. as follows:

Defendants grounds 1, 2, 3, 5 and 6 into the former (section f) and Defendants grounds 4, 7 and 8 into the latter (section h).

DISCUSSION

(f) *"The verdict is not sustained by sufficient evidence or is contrary to law."*

The Plaintiff's evidence was that the Defendants and each of them executed an installment note in December, 1978, calling for the repayment of a loan of $11,047.30 in 55 equal consecutive installments of $200.86 for 55 months. The Defendants allege all payments were made while the Plaintiff Bank alleges that their business records reflect that 52 payments were in fact made and three remain unpaid. The Plaintiff's position was weakened somewhat when early on in the contract repayment period, the Defendant reported the loss of his coupon payment book and requested a new one. Because of a prepayment by the Defendant of some $600 about that time, when the coupon book was printed by a third party at the request of the Bank, some three (3) payments were omitted from the printed coupon book. The omission was thoroughly covered in both direct and cross examination. Thereafter it became solely a matter for the jury to accept, either the Plaintiff's or the Defendants' version and there was adequate evidence to the jury for them to consider the cause.

(h) *"Errors of law occurring at the trial and objected by the party under the provisions of these rules."*

The Defendants cite the failure of the Bank to retain coupons (ground 4) and the allowance, over objection, by the Court of the computer printout under grounds 7 and 8.

As it relates to the alleged former error, the alleged retention schedule in the Defendants' Motion was not offered into evidence at the trial and thereafter will not be considered at this time in a Motion for Judgment N.O.V.

As to the latter two alleged errors, the Court was satisfied by the testimony of the Plaintiff's witnesses that the Plaintiff's exhibit #2 was the authenticated copy of a computer print-out of a business record of this Plaintiff, made in the ordinary course of the business of this Plaintiff, reflecting entries of payments of this Defendant as those payments were made over the four years plus of the installment agreement which was the basis of this litigation and as such, qualified as an exception to the inadmissability of the document based upon the Hearsay Evidence Rule.

For all the foregoing reasons, therefore, the Motion of the Defendants for Judgment N.O.V. ought to be and the same is hereby OVERRULED.

/s/ WILLIAM L. SCHMAEDECKE,
Judge of the Kenton District Court

APPENDIX G

COMMONWEALTH OF KENTUCKY
SIXTEENTH JUDICIAL CIRCUIT
KENTON CIRCUIT COURT
SECOND DIVISION

NO. 82-X-052

EDDIE THOMPSON, JR. and E. J. THOMPSON

Appellants,

vs.

FIRST NATIONAL BANK AND TRUST COMPANY,

Appellee.

APPEAL FROM KENTON DISTRICT COURT
HON. WILLIAM L. SCHMAEDECKE, JUDGE

CASE NO. 82-C-1402

OPINION AFFIRMING

(Filed December 19, 1984)

This is a civil appeal filed by Appellants, Eddie Thompson, Jr. and E. J. Thompson, from the jury verdict entered below on August 9, 1983, the judgment of the District Court entered August 15, 1983, and the District Court's order overruling a motion for judgment notwithstanding the verdict entered on August 24, 1983.

Appellants raise five (5) issues on appeal, which issues are of law and fact. This Court has reviewed the entire record in this case and is satisfied that the findings of the jury were based upon substantial evidence and, as such, can not be disturbed upon appeal. Further, this Court is satisfied from said review that the District Court correctly found and enunciated the law of the Commonwealth of Kentucky and correctly applied same to the facts of this case. Appellants' appeal is without merit and the verdict and judgment of the Kenton District Court should be affirmed.

IT IS THEREFORE ORDERED AND ADJUDGED that the appeal of the Appellants, Eddie Thompson, Jr. and E. J. Thompson, be DISMISSED at their cost. The verdict and judgment of the Kenton District Court is AFFIRMED in its entirety.

SO ORDERED this the 19th day of December, 1984.

/s/ DOUGLAS M. STEPHENS, JUDGE
KENTON CIRCUIT COURT
SECOND DIVISION

APPENDIX H

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 85-CA-206-D

EDDIE THOMPSON, JR. and E. J. THOMPSON,

Movants,

vs.

FIRST NATIONAL BANK AND TRUST COMPANY,

Respondent.

ORDER

BEFORE: GUDGEL, COOPER, and LESTER, JUDGES.

The Court has considered the motion for discretionary review and the response to the motion, and ORDERS that the motion be DENIED.

ENTERED: March 4, 1985

/s/ PAUL D. GUDGEL,
JUDGE, COURT OF APPEALS

APPENDIX I

SUPREME COURT OF KENTUCK
85-SC-259-D
(85-CA-206-D)

EDDIE THOMPSON, JR. and E. J. THOMPSON,

Movants,

vs.

FIRST NATIONAL BANK & TRUST COMPANY,

Respondent.

KENTON CIRCUIT COURT
83-X-52

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion of movants for a review of the decision of the Court of Appeals is denied.

ENTERED May 15, 1985.

/s/ ROBERT F. STEPHENS
Chief Justice

APPENDIX J

COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT No. 82-C-1402
KENTON DISTRICT COURT No. 82-X-52

EDDIE THOMPSON, JR. and E. J. THOMPSON

Appellant-Defendant,

v.

FIRST NATIONAL BANK AND TRUST CO.

Appellee-Plaintiff.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that E. J. Thompson and Eddie Thompson, Jr., the Appellants above named, hereby appeal to the Supreme Court of the United States from the final Order of December 19, 1984, dismissing Movants Appeal and Affirming the Verdict and Judgment of the Kenton District Court. Kentucky Supreme Court denied Discretionary Review on May 15, 1985.

This Appeal is taken pursuant to 28 U.S.C. 1257(2).

/s/ E. J. THOMPSON, Pro Se

/s/ EDDIE THOMPSON, JR., Pro Se
P.O. Box 1221
Covington, Kentucky 41011
(606) 491-6278

CERTIFICATION:

I do hereby certify that a copy of this Notice of Appeal has been served this 6 day of June, 1985, upon: Mr. G. Richard Wilxon, 600 First National Bank Building, Covington, KY.

/s/ E. J. THOMPSON
/s/ EDDIE THOMPSON, JR., Pro Se